United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1005

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1005

B
P/S

UNITED STATES OF AMERICA,

Appellee,

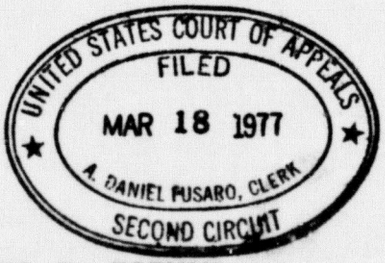
- against -

PETAR MATANIC,

Defendant-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1005

UNITED STATES OF AMERICA,

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- against -

PETAR MATANIC,

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Preliminary Statement

This is an appeal from an order of the District Court for the Eastern District of New York, Bartels, J., entered on December 27, 1977, denying the application of the defendant Petar Matanic, pursuant to Section 3164(c) of the Speedy Trial Act, for his release while awaiting the commencement of the trial of an indictment charging him, and his co-defendants, with air piracy resulting in death and conspiracy to commit the offense (App. B). The appellant and his co-defendants are being held on a bail fixed at $1,000,000 because it was Judge Bartel's "considered opinion that it would be dangerous and risky to release the defendants, not only because there would be such a strong inducement to flee, [but] because there is a strong possibility of danger to the community since the Court's

opinion their motivation to publicize Croatian independence has somewhat affected their rationality" (Tr. 131-132, November 10, 1976).[1/]

The trial of the indictment is scheduled to start on March 23, 1977.

1/ On December 20, 1976, Judge Bartels reaffirmed his prior order in denying the defendant's application to modify the bail conditions pending appeal. This order was unanimously affirmed, without opinion, on January 17, 1976 (No. 76-3084).

STATEMENT OF THE CASE

A. Introduction

This is an appeal without any apparent purpose other than to make work for the appellant's two assigned counsel and to burden an overworked Court with an appeal which cannot, even if successful, result in the release of the appellant. The appellant has been ordered held without bail pending the trial of a related New York State indictment charging him with murder, kidnapping, criminal possession of a dangerous weapon, conspiracy and assault. Accordingly, if the appellant is successful on this appeal, he will be arrested by New York law enforcement officials and incarcerated in Riker's Island instead of the Metropolitan Correction Center.

Under these circumstances, it is no wonder that the attorneys for appellant's co-defendants, among whom is included one of the most prominent criminal trial law firms in the United States, have not pursued this appeal, and have expressly agreed with the position of the United States on the merits of the appeal (Tr. 3, February 2, 1977).

B. The Indictment And Pre-Trial Proceedings

1. On September 21, 1976, nine days after their arrest at John F. Kennedy International Airport, a grand Jury sitting in the Eastern District of New York returned a three count indictment against the appellant and four co-defendants. Counts One and Two alleged that within the Eastern District of New York and elsewhere the defendants "attempted to commit and did commit air piracy as defined in 49 U.S.c., Section 1472(i)(2), in that "the defendants *** by threat of force or violence and with wrongful intent did attempt to and did seize control of an aircraft within the special aircraft jurisdiction of the United States, to wit, a Beoing 727 known as Trans World Airline Flight 355 bound from LaGuardia Airport, Queens, New York, and en route to O'Hare Airport, Chicago, Illinois"[2/] Count Three of the indictment charged the defendants with conspiracy to commit the offense of air piracy (App. B.).

2. On September 27, 1976, the defendants were arraigned on the indictment before Judge Bartels, and each defendant, including appellant, requested a two week adjournment until October 13, 1976 (Tr. 17), to attempt to raise funds for retained counsel. Pursuant to a request of the United States that the district court inquire if each of the

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2/ The difference between the two-counts is that Count One contains the additional allegation that the commission of the offense resulted in the death of New York City Police Officer Brian Murray.

parties desired such an adjournment "charged against their lawyers" (Tr. 16), the following colloquy ensued (Tr. 16-17):

> "The Court: As far as any time running or the computation of time for a Speedy Trial?
>
> ***
>
> Mr. Elefant: if your honor pleases, on behalf of Mr. Matanic, I spoke to him and he makes the same request."

Since it is not disputed that delays caused by the defendants are not included within the ninety day period for the commencement of trial pursuant to Section 3164 of the Speedy Trial Act United States v. Martinez, 538 F.2d 921 (C.A. 2, 1976), the effect of this delay was to move the expiration of the ninety day period from December 11, 1976 to December 26, 1976.

3. On October 13, 1976, after the two week adjournment, the law firm of Williams, Connally & Califano, as it was then known, was substituted as counsel for the defendant Busic. Michael Tigar, Esq., a member of that firm, who was to become the principal spokesman for the entire defense team, appeared for Mr. Busic and told Judge Bartels that the defendant may "be prepared to waive that [the 90 day rule], because there are in this case hundreds of witnesses literally. This is not a case that is going to be easy to prepare. The witnesses are scattered all over the United States" (Tr. 9).

The statement was made after Judge Bartels set the trial for December 6, 1976, within the period of ninety days from the arrest of the defendants.

4. On October 27, 1976, the defendant Busic made an apparently purposeless motion to dismiss Counts One and Two on the ground of improper venue based upon what Chief Judge Kaufman observed was a "tortured and hyperconstricted reading" of the venue statute. United States v. Busic, ____F.2d____, No. 76-1152, Slip op. 1591 (C.A. 2, January 27, 1977). Instead of a trial in New York City area, where they had their only roots and where almost every relevant act took place, the defendants desired a trial in Buffalo, "a city whose only contact with this case is the mere fortunity of being five miles below the speeding airplane that the appellees had hijacked" (United States v. Busic, supra, ___F.2d___, Slip Op. 1595).

Judge Bartels could not understand why the defendants sought this relief, observing at one point (T. 17, November 24, 1976):

> "You want my opinion about this whole business? It makes no sense to try this case in Erie County. Down here you have all the witnesses, the defendants and their friends *** and the purpose of this removal to Buffalo completely escapes me. Do you understand why I wonder?

Whatever the reason for the motion, it was joined by the appellant Matanic, and it became the reason for the delay of the trial date. We say "became" because the defendants themselves made it clear that they would not have been ready to try this case on December 6, 1976. We have already alluded to Mr. Tigar's remarks on October 13, 1976. Again on November 10, 1976, the defendants indicated their intention to waive any speedy trial claim (Tr. 30), and Judge Bartels expressly told them that if the motion to dismiss was denied, "you will have an opportunity to make your applications for another date" (Tr. 65).

5. On November 22, 1976, less than thirty days after the motion to dismiss Count One and Count Two was filed, Judge Bartels granted the motion, although he expressed complete agreement with the United States that the Eastern District of New York was the most logical place to try this case. However, he concluded, "defendants for some reason are dissatisfied with this forum and Congress has not otherwise authorized trial here". On the very next day the United States filed a notice of appeal along with an application for an accelerated schedule for the hearing and determination of the appeal.[3/]

3/ The appellant, quoting half a sentence out of context, suggests that "'the only reason for the appeal'" was that the United States believed Judge Bartels was wrong (Br. p. 9). The fact is that we told Judge Bartels that we would not appeal if that was the only reason. "The only reason we are appealing, with all due respect to you, your Honor, we think you are wrong and we wouldn't appeal if there were a single reason to try this case hundreds of miles from here *** ." (Tr. 15, December 6, 1976).

6. Having made it plain that they could not try this case within ninety days, the defendants predictably began complaining about the delay occasioned by the appeal. Judge Bartels, however, placed the blame for the delay where it rightly belonged, when he said (Tr. 11, December 20, 1976):

> Now, you have been responsible for delaying the trial. Now, you say he's responsible for putting it in the wrong venue. Suppose, in fact, the Court of Appeals said he did not bring it in the wrong place. We are just being very technical. This Court can give you just as fair a trial as the Buffalo court.
>
> Now, how it wound up there is a matter of tactics. When you resort to that luxury you lost your opportunity to a fast trial that you would have received on December 6th.

7. On December 20, 1976, the defendant Matanic, nevertheless moved to be released pursuant to Section 3164 of the Speedy Trial Act. Of course, the motion was premature, because, as we explained, the defendants were plainly responsible for a fifteen day delay which made December 26, 1976, the outside date, assuming the appellant's construction of the Speedy Trial Act is valid. Needless to say, Judge Bartels denied the motion from the bench. On December 27, 1976, he entered a written order which recited the facts and concluded by stating "that excluding the period of time during which the aforesaid

pretrial motion was heard and decided and the period of time for the prosecution of the aforesaid appeal, the ninety day period for trial prescribed by the Speedy Trial Act of 1974 has not run" (App. D).

8. The order dismissing Counts One and Two of the indictment for improper venue was unanimously reversed on January 27, 1977 (United States v. Busic, supra), only thirty one days after the expiration of the ninety day period expired. Contrary to appellants claim, the delay is hardly one of "monumental" porportion (Br. 16). On February 2, 1977, all parties appeared before Judge Bartels to set a date for trial. Mr. Tigar, speaking for all the defendants, except appellant, stated (Tr. 3, February 2, 1977):

> MR. TIGAR: Mr. Schlam [the Assistant U.S. Attorney] and I had a chance to talk before the hearing. I've talked with other defense counsel and I may relate to your Honor, with Mr. Schlam's permission, the results of our conversation.
>
> THE COURT: Fine.
>
> MR. TIGAR: I have agreed with him the time from the beginning on of our motion to dismiss Counts 1 and 2 up to the return of the mandate of the Court of Appeals, which event has not yet happened, as I understand it, is excludable time for purposes of the Act. 4/

4/ Appellant's counsel said he could not join in these remarks because it would prejudice his appeal.

The trial was set to commence on March 21, 1977, and the jury is now scheduled to be chosen on March 23, 1977, the day this case is scheduled to be argued.

C. Suggestion of Mootness

Since the trial is scheduled to begin on the day of this argument, we question whether or not the appeal has become moot. We believe that the purpose of the ninety day rule, accepting appellant's construction of it, is simply to limit to ninety days the period in which a defendant may be incarcerated awaiting the commencement of trial. As Senator Ervin, the principal sponsor of the Speedy Trial Act observed, Section 3164 provides that "detained defendants be tried within ninety days or released from pretrial detention until trial". Hearings Before The Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 93rd Cong., First Sess., pp. 180-181.[5/]

5/ The letter, from which the excerpt quoted above is taken, did not specifically deal with the issue whether there were any periods which would be excluded from the ninety day period. Senator Ervin did, however, say that Section 3164 was "patterned on a similar provision adopted by the United States Court of Appeals for the Second Circuit and clearly should be mandatory for the whole Federal system". Of course, the Speedy Trial Rules adopted by the Judicial Council of this Circuit contained a provision for excludable periods during which specific proceedings concerning the defendant are pending, "including but not limited to *** pre-trial motions [and] interlocutory appeals ***".

So that if there was no "[f]ailure to commence" trial within ninety days and the trial itself went beyond that period (Section 3164(c)), a defendant, whose detention was otherwise proper, would not be released in the middle of trial. Similarly, we submit, once a trial has begun, Section 3164 does not prohibit the reincarceration of a defendant, who had been released as required by Section 3164 to await trial, if such incarceration is otherwise appropriate under the Bail Reform Act. This is so because such defendants are no longer "being held in detention solely because they are awaiting trial" (Section 3164(a)(1)).

Since the trial of the appellant is scheduled to begin on March 21, 1977, the day before this appeal is scheduled to be argued, the defendant will no longer be in custody solely because he is awaiting trial and will no longer be entitled to the release he seeks. Under these circumstances, the appeal is moot.

ARGUMENT

THE ORDER OF RELEASE WAS PROPERLY DENIED

A. Introduction

The Speedy Trial Act, 18 U.S.C., §3161 et. seq., which prescribes certain time limits for the trial of criminal cases to take effect in futuro contains a provision which requires the adoption of a so-called interim plan by the district courts to be effective during "an interim period commencing ninety days following July 1, 1975, and ending on the date immediately preceeding the date on which the time limits provided for under Section 3161(b) and Section 3161(c) *** became effective" (Section 3164).

The so-called interim or transitional plan must contain a provision to insure priority in the trial or other disposition of cases involving "detained persons who are being held in detention solely because they are awaiting trial" (Section 3164(a)). Moreover, Section 3164 provides that during the interim period the trial of such persons shall commence no later than ninety days following the beginning of such continuous detention (Section 3164(b), and that no such detainee "shall be held in custody pending trial after the

expiration of such ninety day period required for the commencement of trial" (Section 3164(c)).

Section 3161(h) of the Speedy Trial Act, however, provides that:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to -
>
> * * *
>
> (D) delay resulting from interlocutory appeals;
>
> (E) delay resulting from hearings on pretrial motions;
>
> * * *
>
> (G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.
>
> * * *

Pursuant to the direction of the Speedy Trial Act, the judges of the United States District Court for the Eastern District of New York adopted an interim plan which provided for the trial of detained defendants, as defined in Section

3164(a), within ninety days of their arrest. Moreover, the plan further provides that any period of delay resulting from other proceedings concerning the defendant, including but not limited to the periods specifically set out in Section 3161(h), shall not be included in calculating the ninety day period. Transitional Plan Pursuant to the Provisions of the Speedy Trial Act, Rule 9.

B. The Eastern District Transition Plan Is Consistent With The Speedy Trial Act

The plan adopted by the judges of the Eastern District of New York and approved by a reviewing panel consisting of the members of the Judical Council of the Second Circuit and a judge of the Eastern District of New York (Section 3165(c)), is plainly consistent with the Speedy Trial Act, since the excludable periods are expressly authorized by Section 3161(h). The argument to the contrary, based upon the claim that the excludable periods contained in Section 3161(h) are not applicable to the interim plan, is without support either in the language of Section 3161(h) or the legislative history.

We have appended to our brief a detailed summary of the legislative history of these provisions of the Speedy Trial Act prepared by H.M. Ray, which plainly shows that Section 3164 is patterned after the Speedy Trial Rules adopted

by this Court and which provided for excludable periods similar to those contained ir Section 3161(h). Ray, Speedy Trial Act of 1974: Applicability of Exclusions to Interim Limits, pp. 5-11. Nor is there a scintilla of evidence in the legislative history to support the position that Congress intended that those periods not apply to the interim plan.

The only support for the inapplicability of the excludable periods contained in Section 3161(h) is that they are set out in the section dealing generally with the permanent time limits and Section 3161(h) does not specifically say that the excludable periods are applicable to the interim plan. But it seems perfectly reasonable for Congress to have assumed that the Act would be read as a whole and that no one would assume that it intended more stringent rules to apply during the interim period than when the permanent time periods became effective.

So, for example, when Section 3161(b) and (c) go into effect on July 1, 1979, and Section 3164 is no longer effective, there will be a one hundred day time limit, not including periods of excludable delay, in which all defendants must be brought to trial, and no provision is made for the release of defendants detained pending trial. Had the permanent

time limits been in effect here, the appellant Matanic would be entitled to no relief under the Act since one hundred days, excluding periods of excludable delay, have not yet elapsed since his arrest.[6/]

6/ We make this calculation as follows:

1.	September 12, 1976 (arrest) to September 27, 1976 (arraignment)	15 days
2.	September 27, 1976 to October 13, 1976 (delay at express request of defendant)	excluded
3.	October 13, 1976 to October 27, 1976 (date on which pretrial motions are filed)	14 days
4.	October 27, 1976 to November 22, 1976 (Order dismissing Counts One and Two filed)	excluded
5.	November 23, 1976 (notice of appeal filed) to January 27, 1977 (appeal decided)	excluded
6.	January 27, 1977 to February 2, 1977, (when March 21, 1977 is set for trial with consent of all parties)	5 days
7.	February 3, 1977 to March 23, 1977	48 days
	Total	82 days

The last 48 days give the appellant the benefit of the doubt, since additional pretrial motions, including another to dismiss Count One, have been filed and pretrial hearings are taking place.

We think that it is nothing short of absurd to suggest that the appellant should be entitled to an opportunity to flee or commit another hijacking, both of which Judge Bartels found to be a possibility in setting such a high bail, under the interim plan when he would be entitled to no relief under the permanent plan enacted by Congress. The language of the Act and the intent of Congress are not so clearly expressed as to require such a result. As Judge Friendly aptly observed in J.C. Penney Co. v. Commissioner of Internal Revenue, 312 F.2d 65, 68 (C.A. 2, 1962):

> "Congress is free, within constitutional limits to legislate eccentrically if it should wish, but courts should not lightly assume that it has done so. When the 'plain meaning' of statutory language 'has led to absurd or futile results', the Supreme Court 'has looked beyond the words to the purpose of the act'; "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the legislation as a whole'", the Court has followed the purpose rather than the literal words."

Accordingly, it is not surprising that the cases which have considered the issue have adopted the argument that the excludable periods contained Section 3161(h) apply to Section 3164. The leading opinion is that of Judge Carter in United States v. Mejias, 417 F.Supp. 579 (S.D.N.Y.), affirmed

on other grounds, sub nom. United States v. Martinez, 538 F.2d 931 (C.A. 2, 1976) which accepted the arguments which we made here. The reasoning of his opinion was expressly adopted by the Court of Appeals for the District of Columbia Circuit in a per curiam opinion joined by Judges Wright, McGowan and Wilkey. United States v. Corley, ___F.2d___, No. 76, 2096 (C.A.D.C., December 27, 1976). Accord: United States v. Masko, 415 F.Supp. 1317 (W.D. Wis. 1976).

While the Court of Appeals for the Ninth Circuit has held that the excludable periods contained in Section 3161(h) are not applicable to Section 3164, United States v. Tirasso, 532 F.2d 1298 (C.A. 9, 1976), it has construed Section 3164 in a way that would exclude most of the periods set out in Section 3161(h).

So, for example, in Moore v. District Court, 525 F.2d 328, 329 (C.A. 9, 1975), it held that the time during which a detained defendant is undergoing an examination to determine her competency to stand trial, and the time consumed for a hearing on that issue, are excluded from the ninety day period:

> A detained defendant must be brought to trial within the time limited by 18 U.S.C. §3164(b) if the defendant falls within subsection 18 U.S.C. §3164(a)(1). However, a district judge may, upon a finding that the demands of due process so require, exclude both (1) the period during which a defendant is detained for a study of his mental competency pursuant to a court order under 18 U.S.C. §4244 and (2) the time consumed by court hearings on the defendant's competency, from the ninety (90) day period set forth in 18 U.S.C. §3164(b). Upon such a finding, a detained defendant is not a defendant detained soley because he is awaiting trial under 18 U.S.C. §3164(a)(1) during the time he is committed pursuant to 18 U.S.C. §4244 for a study to determine his mental competency or during the time consumed by court hearings on his mental competency.7/

Accord: United States v. Bigelow, 544 F.2d 904 (C.A. 6, 1976).

By this literal definition of the "solely because they are awaiting trial" clause of Section 3164, the appellant here was not detained "soley" because he was awaiting trial; instead he was detained pending the hearing of pre-trial motions and the appeal from the dismissal of the two major counts of the indictment as authorized by Section 3731.8/ While

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7/ Section 3161(h) makes this period an excludable one.

8/ In United States v. Tirasso, supra, the subsequent holding of the Ninth Circuit, relied upon by the appellee, the delay was simply due to the complex nature of the case, and not to any specific pretrial proceeding.

this may be a somewhat strained reading of the language of Section 3164, it is not altogether unreasonable; since its effect would be to exclude those periods during which proceedings would be undertaken to facilitate the trial itself, and include those periods in which nothing is happening while the defendant is incarcerated. Of course, that is the very purpose of Section 3161(h).

C. Excluding The Periods Permitted By Section 3161(h), The Ninety Day Period For Trial Has Not Elapsed

The appellant's final argument is that, even if the excludable periods set forth in Section 3161(h) are deemed generally applicable "they are of no help to the government" because the appeal is "from a final order of dismissal, it is not 'interlocutory' as provided for in the only applicable excludable period set out in Section 3161(h)(1)(D)" (Brief p. 15). This claim is frivolous.

The order of the district court was no more final than the order directing a change of venue, since it did not finally resolve the case on the merits, but merely held that the indictment had to be tried in another district. Cf. United States v. DiStefano, 464 F.2d 845 (C.A. 2, 1972).

Moreover, Section 3161(h), and Rule 9 of the interim plan adopted pursuant to Section 3164, do not limit excludable periods solely to those specifically set forth in Section 3161(h)(1)(D).

We believe that the period for appeals from orders dismissing counts of an indictment, or at least those finally dismissing major counts, surely stand on the same footing as an order suppressing evidence. Congress has expressly provided that a defendant be held on bail pending such appeals (18 U.S.C. §3731); and quite clearly appeals, which finally terminate a prosecution, are more important than appeals from suppression orders which deal only with the exclusion of certain evidence.

CONCLUSION

The order of the district court denying the motion for release should be affirmed.

Dated: Brooklyn, New York
March 14, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN
Chief Assistant United States Attorney,
Of Counsel.

SPEEDY TRIAL ACT OF 1974:

APPLICABILITY OF EXCLUSIONS TO INTERIM LIMITS

SPEEDY TRIAL ACT OF 1974: APPLICABILITY OF EXCLUSIONS TO INTERIM LIMITS

By H. M. Ray*

Introductory

The purpose of this paper is to set forth the pertinent legislative history dealing with interim limits, 18 USC 3164. Although S.754 was enacted by the 93rd Congress, it was during the 92nd Congress that a decision was made by Senator Ervin and members of his subcommittee to propose the 90 day interim limits for the trial of defendants in custody, ultimately adopted as Section 3164 of the Speedy Trial Act of 1974, which provides:

> **"§ 3164. Interim limits.** 18 USC 3164.
>
> "(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving— Interim plan.
>
> "(1) detained persons who are being held in detention solely because they are awaiting trial, and
>
> "(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.
>
> "(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.
>
> "(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

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* United States Attorney (1961-); Member and Vice-Chairman of the Attorney General's Advisory Committee of United States Attorneys and Chairman of its Subcommittee on Legislation and Court Rules (1973-).

The United States Court of Appeals for the Second Circuit, on January 5, 1971, adopted a plan for the prompt disposition of criminal cases, which required the government, *inter alia*, to be ready for trial within 90 days from a defendant's date of detention, and ready for trial within 6 months in other criminal cases. In computing the 90 day and 6 month periods within which ~~to~~ The government was required to be ready for trial, the Second Circuit plan provided that certain periods of time would be excludable. The Second Circuit plan provided in part as follows:

> "1. Priorities in scheduling criminal cases.
> Insofar as is practicable:
> (a) the trial of criminal cases shall be given preference over civil cases, as provided by Rule 50, Federal Rules of Criminal Procedure; and
> (b) the trial of defendants in custody and defendants whose pre-trial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.
>
> * * * * * * * * * *
>
> "3. In cases where a defendant is detained, the government must be ready for trial within ninety days from the date of detention. If the government is not ready for trial within such time, and if the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine, unless there is a showing of exceptional circumstances justifying the continued detention of the defendant, and then the detention shall continue only for so long as is necessary. This shall not apply to any defendant who is serving a term of imprisonment for another offense, nor to any defendant who, subsequent to release under this rule, has been charged with another crime or has violated the conditions of his release.
>
> "4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged

only with non-capital offenses, then, upon application of the defendant or upon motion of the district court after opportunity for argument, the charge shall be dismissed.

"5. In computing the time within which the government should be ready for trial under rules 3 and 4 the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incomptetnt to stand trial, pretrial motions, interlocutory appeals, trial of other charges, and the period during which such matters are subjudice." 1/ [Emphasis Supplied]

Research into the record of Senate hearings conducted during the 92nd Session of Congress on interim limits, and incorporated into Senate hearings during the 93rd Session, discloses that Section 3164 is based on the 90 day plan for trying defendants in custody earlier adopted by the United States Court of Appeals for the Second Circuit. The Second Circuit plan specifically provided that excludable periods of delay were to be excluded from the 90 day time limits for trying defendant in custody. The Second Circuit plan was the forerunner to the so called original model plans for the prompt disposition of criminal cases in the United States district courts, all of which recognize the applicability of excludable time from the 90 day requirement for trying defendants in custody. As a part of the record, the Senate hearings also incorporated a Georgetown Law Journal article which recognizes that certain periods of time should be excluded from considering whether the right of speedy trial has been violated. The article acknowledges that excludable delays are also

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1/ Hearings Before House Subcommittee On Crime of the Committee of the Judiciary, House of Representatives, 93rd Congress, Serial No. 42, pages 1094-1095.

applicable to interim limits where defendants are in custody. The record of the House hearings also contains information which indicates that excludable time is applicable to the trial of defendants in custody. Not only does the House record contain the same Georgetown Law Journal article appearing in the earlier Senate hearings, but the House record also includes ABA standards relating to speedy trial, which likewise provide for the excludability of time for the trial of defendants in custody. The House also incorporates into the record the Second Circuit rules regarding prompt disposition of criminal cases, alluded to in the Senate hearings. This recently found legislative history, showing the genesis of the interim 90 day requirement for trial of defendants in custody, the absence of a scintilla of legislative intention to the contrary, and the fact that Section 3161(h) does not have any delayed effective date should leave no doubt that excludable delay, as defined in 3161(h)[2/] equally applies to a defendant in custody during the interim limits.

Senate History

The legislative history discloses that the proposal for 90 day interim limits, Section 3164, was incorporated into speedy trial legislation more than two years prior to final passage of the Speedy Trial Act of 1974. The history of this legislation clearly indicates that it was not intended for the interim plan to be self-contained, but that Senator Ervin and his subcommittee carefully considered Section 3164 and integrated it into the

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2/ See also Sections 3165(b)(1) and 3166(b)(2) which likewise indicate that Congress intended no delayed effective date as to Section 3161(h), inasmuch as Section 3166(b)(2) requires that even prior to July 1, 1976, each district plan shall include information concerning the implementation of the time limits and other objectives including, "the incidence of, and reasons for, periods of delay under Section 3161(h)." [Emphasis Supplied]

proposed speedy trial legislation during the 92nd Congress. The origin of interim plans, disclosed in the legislative history and materials submitted to the Congress in both the 92nd and 93rd Sessions, evidences the intention that excludable delay apply both to the 90 day interim segment for trial of defendants in custody as well as to the segment for disposition of all other criminal cases.

By letter of July 7, 1972, Senator Ervin wrote to Ralph Erickson, Deputy Attorney General, advising that Section 3164 to S.895 was patterned upon a similar provision adopted by the United States Court of Appeals for the Second Circuit. Senator Ervin's letter, which is a part of the legislative record, [3/] is set forth in part below:

> "DEAR MR. ERICKSON: As you will recall, the Department of Justice has been cooperating with the Subcommittee on Constitutional Rights in its consideration of S. 895, the speedy trial bill. On September 14, 1971, Justice Rehnquist, then Assistant Attorney General, represented the Department before the Subcommittee. His excellent testimony and subsequent correspondence served as a comprehensive critique and analysis of the bill. I have spent the past few months redrafting S.895 so that the recommendations made by the Department might be reflected in the bill.
>
> I am enclosing for your information an amendment in the nature of a substitute for S. 895. This amendment has been proposed to the Subcommittee and reflects most of the Department's recommendations. Along with the draft of the amendment I have enclosed memoranda summarizing the major changes in the new amendment, a detailed section-by-section analysis and an explanation of the reasons for each change.
>
> * * * * * * * * * * * *
>
> The new bill makes five major changes in S.895. First, although the basic provision requiring that defendants be

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3/ Hearings Before The Subcommittee on Constitutional Rights of the Committee On The Judiciary, United States Senate, 93rd Congress, First Session, pages 180-181.

tried within 60 days* or have their charges dismissed would be retained, the 60 day requirement would not become operative until 3 years after enactment. In the meantime, beginning one year after enactment, trials would have to be held within 180 days and, beginning 2 years after enactment, trials would have to be held within 120 days. There was considerable sentiment among the witnesses that it was unrealistic to expect Federal courts to be able to conduct 60 day trials within 3 months of enactment in some criminal cases as provided in S. 895. The amendment is based upon a suggestion by Senator Percy and others that the time limits be phased-in over a number of years. I believe the new version strikes the proper balance between the practical needs of the courts, and the important goal of achieving 60 day trials as soon as practicable.

Second, the amendment would add a new section 3164 to S. 895 which would provide that beginning three months after enactment and continuing until the 60 day provision is effective 3 years after enactment, detained defendants be tried within 90 days or be released from pretrial detention until trial. There was consensus among the witnesses that although immediate implementation of 60 day trials was impractical, it was feasible and necessary to provide speedy trials for detained defendants. This change is patterned upon a similar provision adopted by the U.S. Court of Appeals for the Second Circuit and clearly should be mandatory for the whole Federal system. [Emphasis Supplied]

* * * * * * * * * * * * *

Sincerely yours,

SAM J. ERVIN, JR.
Chairman"

During the Second Session of the 92nd Congress, the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, Chaired by Senator Ervin, submitted a report to accompany S.895 (forerunner to S.754), which leaves no doubt that Section 3164 is based upon the interim plan adopted by the United States Court of Appeals for the Second Circuit. The section by section analysis of the report accompanying S.895 explained the interim plans as follows:

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* NOTE: The S.895 proposal provided for trial within 60 days from arrest--not from arraignment and not within the 100 [30-10-60] days, as finally enacted in S.754.

"Section 3164 interim plans

This section would require jurisdictions to implement interim plans within 3 months of enactment to remain in effect until the effective date of the 60-day time limits 3 years after enactment. (See Calendar of Implementation Chart A, p.-.) These interim plans must provide that all detained defendants and all released defendants considered to be 'high risk' by the U.S. attorney be tried within 90 days. The sanction for failure to try detained defendants within 90 days would be release, and 'high risk' defendants would have their release conditions automatically reviewed.

"Section 3164 has been added to title I of the legislation pursuant to a suggestion by Professor Dan Freed that certain minimal speedy trial requirements be placed into operation soon after enactment and until the courts are prepared to implement 60-day trials. This new section requires jurisdictions to implement interim plans within 90 days of enactment to remain in effect until the effective date of the 60-day provision in section 3161, which would be 3 years after enactment. These interim plans would be similar to the plan adopted by the U.S. Court of Appeals for the Second Circuit. (See Section IV. Discussion, p.-.) The section would require trials within 90 days for pretrial detainees or 'high risk' defendants who are on pretrial release pending the full effectiveness of section 3161 and 3162. The sanctions for failure to adhere to the limits would not be dismissal with prejudice, as in section 3162, but pretrial release in the case of detainees and review of release conditions in the case of high risk releasees. The provision would not apply to detainees who have already been convicted of another offense because independent grounds for their detention exist."4/ [Emphasis Supplied]

The view that exclusions were considered by Congress as applicable to the 90 day interim limits is illustrated and clearly supported by materials submitted to the Congress and made a part of the legislative record during both the 92nd and 93rd Sessions. Included in the legislative record is a most significant and enlightening Georgetown Law Journal article5/ which discussed the Second Circuit rules, *inter alia*, as follows:

4/ Senate Hearings, pp. 33-34 and 56.

5/ Senate Hearings, pp. 61-106. See also, "Speedy Trial: Constitutional Right in Search of Definition," 61 Georgetown Law Journal 657.

"The ABA Standards, Second Circuit Rules, and New York legislation divide the speedy trial time period into two segments, applying an interim remedy to defendants in custody after the shorter period has elapsed and a final remedy to all defendants when the entire period has run. On expiration of the shorter time limit, which is applicable only to defendants held in custody, the defendant must be released on bail or recognizance."6/ [Emphasis Supplied]

The legion of authorities cited in the article, and obviously relied on by Congress in the absence of anything in the legislative record to the contrary, unequivocably support the following:

(1) Certain periods of delay are excludable in considering when the right to a speedy trial has been violated.7/

(2) The delay periods are excludable from the interim time limits.8/

The Model Plan For the United States District Court for Achieving Prompt Disposition of Criminal Cases was also made a part of the Senate record in 1973 during Senate consideration of S.754.9/ It is very apparent that the 90 day trial time for a defendant in custody in the Model Plan was patterned upon the Second Circuit Plan, for it, too, provided that certain periods of delay are excludable from the computation of time limits required for trying a defendant in custody within 90 days, (see Paragraph 2, Time Requirements, and Paragraph 3, Extension of Time Limits, of the Model Plan).

6/ Senate Hearings, p. 102-103. See also 61 Georgetown Law Journal 657 at pp. 698-699.

7/ "It is universally agreed that certain periods of time should be excluded from consideration when determining whether the right to a speedy trial has been violated." [Citations omitted]. Senate Hearings, pp. 81-82. See also, 61 Georgetown Law Journal 657 at pp. 677-678. [Emphasis Supplied]

8/ "There are certain periods of delay which are excludable from the interim time limits." [Citations omitted]. Senate Hearings, p. 103. See also 61 Georgetown Law Journal 657, at p. 699, Footnote 257. [Emphasis Supplied]

9/ Senate Hearings, pp. 217-220.

House History

The Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, held hearings on the Speedy Trial Act of 1974 on September 12, 18 and 19, 1974.[10/] Senator Sam Ervin, leadoff witness before the House Subcommittee, in acknowledging a question from Mr. Pepper that there should be a seven year period before requiring a shorter period for a 60 [or 90 day] trial from indictment, stated [at page 167]:

> "SENATOR ERVIN. Yes. This bill recognizes that this is a complex question and has to be put into effect on a gradual basis. The bill provides for--it starts out with mild time limits and gradually over a period of 5 years gets down to a 30-day arrest to indictment requirement, and also reducing the 180-day period for trial down to 60 days.
>
> "I might state, furthermore, we recognize there has to be a good deal of flexibility in a bill of this kind because you cannot have your requirements too rigid. You have to choose between them being not rigid enough on the one hand and too rigid on the other. So we provide certain exclusions of time in a computation of these time limits for the beginning of the trial by providing that delays that result that are unavoidable will be excluded in computing the time limits.
>
> "These are specified on pages 4 and 5 of the bill, and I think they take care of all of these situations where there should be exclusions from the time. Under this there is enough flexibility in the bill to allow courts to function on these provisions."[11/] [Emphasis Supplied]

10/ Hearings Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 93rd Congress, Second Session, Speedy Trial Act of 1974, Serial No. 42.

11/ An examination of pages 4 and 5 of S.754 will disclose that Senator Ervin was referring to 3161(h) exclusions. See, House Hearings, pp. 8-9.

Subsequently, Senator Ervin, on being questioned by Mr. Fish as to problems or benefits that might flow from establishing national uniform time standards, stated [House Hearings, p. 174]:

> "Senator ERVIN. I would say if it were not for the provisions which are set forth on pages 4 and 5 of the bill and to some extent the special features on page 6. These provide a flexibility which enables the courts in administering this act, in unusual circumstances or circumstances which may frequently arise to use a degree of flexibility in computing these time limits, so that certain periods of delay will be excluded from the computation.
>
> "For example, on page 4, we find exclusions for any delay resulting from any examination and hearing on competency, for the defendant standing trial, on mental grounds; any delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code, which deals with the power of the court to temporarily commit narcotic addicts prior to trial; delay resulting from trials with respect to other charges against the defendant; delay resulting from interlocutory appeals; and delay resulting from hearings on pretrial motions.
>
> "And those, I think, give the degree of flexibility which makes the bill workable rather than a very rigid bill which would promote injustice in many cases." [Emphasis Supplied]

As noted in the above description of the bill, the chief sponsor treated the legislation as a complete, unified and comprehensive single Act which would implement the right to a speedy trial "on a gradual basis",

with time requirements not "too rigid", with "certain exclusions of time" applicable to the time limits, and with a "degree of flexibility which makes the bill workable rather than a very rigid bill which would promote injustice . . . ."

Senator Ervin's testimony [House Hearings, pp. 157-175] yields not a scintilla of support for those who urge that the interim limits section (3164) is self-contained or that it is to be interpreted as rigid and inflexible. In fact, Senator Irvin did not even mention the interim limits in his testimony, neither did he make any distinction in the applicability of delay periods to the interim segment for trial of defendants in custody and to the phased-in segment for trial of all other defendants.

The reasonable conclusion to be gleaned from the words of the Speedy Trial Act's chief architect and the pertinent materials in the legislative record, is that he, and in turn the Congress, thoroughly understood the Second Circuit plan, which specifically provided that delay periods were equally applicable to all defendants whether in custody or not.

(b) the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases.

* * * * * * * * *

"2.1 Speedy trial time limits.

A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specified event. Certain periods of necessary delay should be excluded in computing the time for trial, and these should be specifically identified by rule or statute insofar as is practicable.

* * * * * * * * *

"2.3 Excluded periods.

The following periods should be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trial of other charges."

The House of Representatives Report on the Speedy Trial Act of 1974, No. 93-1508, at page 39, acknowledges that the House Committee on the Judiciary "made no changes" in Section 3164. Thus, it should be clear that both Houses of Congress, in providing that a defendant in custody be tried within 90 days, did so on the basis of the Second Circuit plan, and did so with the understanding, like the Second Circuit, that in computing the time for such trials that designated periods of delay would be excludable.

In the general description of the phase-in period and the applicability of exclusions, House Report, No. 93-1508, at page 21, states, in part:

"Phase-in period

During the first year following enactment, no time limits are prescribed by the bill; it is not until the second year that the first graduated time limits become effective. . . ."

". . . The time limit between indictment and arraignment, which would be 10 days, remains constant throughout the life of the law. [Section 3161(f) and (g)].

"Exclusions

The time limits would be tolled by hearings, proceedings and necessary delay which normally occur prior to the trial of criminal cases."

No Delayed Effective Date For Exclusions

Not only does the provision for delay periods [3161(h)] have no delayed effective date, but the Congress, a fortiori, in Section 3166(b)(2), mandated that even prior to July 1, 1976 each district plan shall include information concerning the implementation of the time limits and other objections including, "The incidence of, and reasons for, periods of delay under Section 3161(h)." The only section of the Act that is not now effective is Section 3162, Sanctions.[15/]

There are no delayed effective dates with respect to the provision for filing of an indictment or information, arraignment, and trial [Sections 3161(b) and (c)], rather the time limitations only for filing of an indictment or information and for trial are delayed and are to be phased-in over a four year period.[16/]

15/ "Section 3163. Effective dates.

* * * * * * * * * * * * * * *

"(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975." [Emphasis Supplied]

16/ Sections 3163(a) and (b) provides for the applicability of "the time limitation" only of Sections 3161(b) and (c). Sections 3161(f) and (g) also deal with the phasing-in of time limitations only of Sections 3161(b) and (c). Thus, except for the "time limitations" only, all of the text of Sections 3163(a) and (b) are now in effect.

Conclusion

It should thus be apparent that the excludable delay periods of the Act apply to the 90 day interim requirement for the trial of defendants in custody or of high risk. To deem these exclusions inapplicable during the interim period not only would require a finding that Congress intended to make the Speedy Trial Act more stringent[17/] during the interim period than will be required thereafter--obviously contrary to all the testimony and record contained in the long legislative history of the Act and the mandate of Sections 3165(e) and 3166(b)(2), but such would ignore the specific language of the Act which delays the effectiveness of only one section, Sanctions, Section 3162.

From the outset the Act has provided for the speedy trial time period in two segments: one applying to the interim 90 day provision for the trial of defendants in custody and those of high risk, and an extended period for the trial of all other defendants;[18/] and applying to both segments are certain periods of delay [Section 3161(h)] which are excluded from the computation of the time limits.

17/ At the time Senator Ervin proposed the interim 90 day requirement, the bill [S.895] would have mandated trials within 60 days from arrest --not 100 days [30-10-60] as finally adopted in S.754.

18/ The extended period for the trial of other defendants has no time limitation until July 1, 1976, at which time the first graduated time limits (180 days) become effective.

Like the provisions of the Second Circuit and Model Plans for the prompt disposition of criminal cases, the Speedy Trial Act of 1974 embodies a coherent[19/] and comprehensive set of statutes to implement the right to a speedy trial. The basic statutes deal with: (1) the trial calendar, Section 3161(a); (2) time limits, including interim limits for trial of defendants in custody, Sections 3161(b) through (e), and 3164; (3) consequences of exceeding the limits, Section 3162; and (4) the special problem of a defendant already serving a term of imprisonment, Section 3161(j). These statutes are tempered by the provisions of Section 3161(h) that exclude certain periods[20/] in computing the time for indictment, arraignment and trial.[21/] Moreover, the Congress did not delay the effective date of Section 3161(h), and these statutes and the legislative history of the Act make no distinction between the applicability of excludable delay periods to the interim segment requiring trial of defendants in custody or of high risk and to the phase-in segment for trial of all other defendants.

19/ Notwithstanding inadvertent and obvious failure to make a few conforming technical amendments following significant House changes, i.e., failure to conform Section 3161(h) to indicate that exclusions are equally applicably to the arraignment period. The legislative history is quite clear that exclusions are applicable from the time of arrest or service of summons until time of trial (S. Rep. 93-1021, pp. 32-22 and H. Rep. 93-1508, p. 21). See also, Guidelines To The Administration Of The "Speedy Trial Act of 1974", at page 12, published by the Committee On The Administration Of The Criminal Law of The Judicial Conference of The United States.

20/ Section 3161(j) requires the attorney for the government to act "promptly," rather than within specific time limits.

21/ A similar conclusion was reached with respect to ABA standards by William H. Erickson, Justice, Supreme Court of Colorado, and Chairman of the ABA Section on Criminal Law, in his article entitled, "The Right To A Speedy Trial: Standards For Its Implementation," and also made a part of the record in the Hearings Before the House Subcommittee On Crime. House Subcommittee Hearings, pp. 1004-1012 and 1014. See also, 10 Houston Law Review 237, pp. 245-247.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

EDWARD R. KORMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 14th day of March 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Martin Elefant, Esq.
16 Court Street
Brooklyn, New York 11201

Paul B. Bergman, Esq.
25 Broadway
New York, New York 10004

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Edward R Korman

Sworn to before me this
14th day of March 19 77

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977